Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1994

BOBBY JOE HUGHES,

Petitioner,

V.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the standard of notice in Federal Employers' Liability Act cases set by the united States Supreme Court and Federal Appellate Courts should be raised to Virginia common law notice standards?

2. Whether the standard of negligence in Federal Employers' Liability Act cases set by the United States Supreme Court in Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957) should be raised to Virginia common law negligence standards?

LIST OF PARTIES

The Petitioner is Bobby Joe Hughes.

The Respondent is Norfolk and Western Railway Company.

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OPINIONS IN COURTS BELOW

The Trial Court issued an Order on November 10, 1992 denying Respondent Norfolk and Western Railway Company's (Norfolk and Western) Motion to Set Aside Verdict and entered judgement upon the jury verdict in favor of Petitioner Bobby Joe Hughes (Hughes) in the sum of Eight Hundred Thousand Dollars ($800,000.00) and his costs expended (App. 1).

The Supreme Court of Virginia issued an Order and Opinion on January 7, 1994 reversing the judgement of the Trial Court and entering final judgement in favor of Respondent. The Supreme Court of Virginia's Order and Opinion are reproduced at App. 3 through 16.

JURISDICTION

Jurisdiction is invoked in this Court under 28 U.S.C. § 1257(a) to review an Order and Opinion of the Supreme Court of Virginia dated January 7, 1994 which reversed the judgement of the Trial court on the Jury verdict. The case was brought under 45 U.S.C. Section 51-60. This petition is timely filed.

RELEVANT STATUTES AND REGULATIONS

The Federal Employers' Liability Act, 45 U.S.C. Section 51 states:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the

negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties of such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 ET SEQ.] as the same has been or may hereafter be amended. (Apr.

22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404.)

STATEMENT OF THE CASE

This Federal Employers' Liability Act ("FELA") case arose out of an injury sustained by Petitioner Hughes on the night of October 14, 1988 at Webb, West Virginia while working as a brakeman for Norfolk and Western. Shortly after midnight, Hughes had to perform an inspection of the train brakes which he did by walking the length of the train, approximately one and one half to two miles. (App. 24-34) It was dark in the area because the train was situated on a track located between two mountains. (App. 35) Hughes used a lantern to light his way and inspect the brake pistons. (App. 32, 40)

After inspecting the entire train, Hughes signaled to the engineer to release the brakes and he began to walk westward toward the engine to inspect the pistons to see if the brakes had released. After walking for a mile or

more westward, he "stumbled and fell" while walking on the ballast. (App. 33) Hughes testified that "[o]nce I fell, when I first got up, my first intent was what happened, what did I fall over and I kind of glanced around and the only thing I saw was a split cross tie sticking up." (App. 34)

Norfolk and Western's Answers to Hughes' Interrogatory Number Eight indicated that during the year preceding the accident the tracks where Hughes fell were inspected twice each week on Mondays and Thursdays in compliance with FRA requirements. The inspections consisted of visual examinations of the tracks by high rail vehicles which run on the rails. There was no evidence presented at trial which showed the results of those inspections for this time period or that they were done properly. (App. 49-53)

Walter Eubanks, an experienced railroad employee of over twenty five years, testified that he had worked in Webb, West Virginia on numerous occasions and that there was no lighting in that area at night. Mr. Eubanks further testified that crossties are used to "hold the rail in place", (App. 58) and that "a split, raised crosstie would be a crosstie that had for some reason split and was raised up and sticking up above the ballast" (App. 57), and that crossties "don't come in pieces". (App. 59) Mr. Eubanks testified that if he saw a split, raised crosstie, he would report it to his supervisor "because it was an unsafe condition." (App. 60)

Hughes brought his suit in the Circuit Court of the City of Roanoke, Virginia under 45 U.S.C. §§ 51-60 commonly known as the Federal Employers' Liability Act, seeking compensation for his injuries. The case was

tried before a jury on September 14, 1992 and September 15, 1992. At the close of Hughes' evidence, norfolk and Western made a Motion to Strike Plaintiff's Evidence and argued that the plaintiff had not established that Norfolk and Western knew or should have known of the presence of the split, raised crosstie because there was no evidence as to when this condition occurred. The Court overruled Norfolk and Western's Motion and stated:

> I think that the jury can find from the evidence that something as heavy as a railroad ties wouldn't spring up instantaneously and be in such a condition weighed down by a railroad track. I am not sure that that is beyond the range of their ability to know and infer. (App. 62-63)

On September 15, 1992 the jury returned a verdict in favor of Hughes in the amount of Eight Hundred Thousand Dollars ($800,000.00). Norfolk and Western filed a Motion to Set Aside Verdict and Memorandum of October 6, 1992 arguing that Hughes failed to prove that

Norfolk and Western knew or in the exercise of ordinary care should have known that a dangerous condition, the split, raised crosstie, existed and that Norfolk and Western Railway Company had a reasonable opportunity to remedy the condition.

Hughes filed his Memorandum in Opposition to Defendant's Motion to Set Aside Verdict on October 14, 1992. Norfolk and Western filed a Reply Memorandum on November 2, 1992. The Trial Court heard oral argument on November 10, 1992 and issued an Order on that date denying Norfolk and Western's Motion to Set Aside Verdict and entered judgement on the jury verdict.

Norfolk and Western petitioned the Supreme Court of Virginia for an Appeal. Hughes filed his Brief in Opposition to Norfolk and Western's Petition for Appeal on March 2, 1993.

The Supreme Court of Virginia granted Norfolk and Western's Petition for Appeal on April 20, 1993. Norfolk and Western filed its Brief of Appellant with the Supreme Court of Virginia on May 28, 1993 and argued that Norfolk and Western was entitled to judgement as a matter of law because plaintiff failed to introduce evidence from which a jury could conclude that Norfolk and Western knew or should have known that the split, raised crosstie existed. Norfolk and Western also argued that a new trial was required on two unrelated grounds.

Hughes filed his Brief of Appellee with the Supreme Court of Virginia on June 25, 1993 and responded that the testimony at trial was sufficient under FELA and the cases interpreting it to allow a jury which was correctly instructed at trial to infer and find that it would take time for a crosstie to become split and raised, thereby charging

Norfolk and Western with constructive notice of that unsafe condition.

Hughes also argued that the evidence presented at trial showed that the railroad failed to use ordinary care to provide him with a safe place to work because he had not been provided adequate lighting when he walked through the area of Webb, West Virginia.

Hughes concluded that the evidence which had been given at trial regarding the crosstie and the inadequate lighting presented a jury question as to Norfolk and Western's negligence which had been properly submitted to the jury. The jury had found that Norfolk and Western was negligent under these facts and Hughes argued that the verdict should not a disturbed.

Norfolk and Western filed its Reply Brief of Appellant with the Supreme Court of Virginia on July 19, 1993.

After oral argument before the Supreme Court of Virginia on November 3, 1992, the Supreme Court of Virginia issued an Order and Opinion by Justice Leroy R. Hassell reversing the judgement on the jury verdict and entered final judgement in favor of Norfolk and Western on January 7, 1994. The Supreme Court opined that there was no evidence of record from which an inference could be drawn that Norfolk and Western had constructive notice of the split, raised crosstie. The Supreme Court of Virginia further opined that Hughes waived his claim that Norfolk and Western was negligent for failing to provide sufficient lighting in Webb, West Virginia.

REASON FOR GRANTING THE WRIT

1. THE EVIDENCE PRESENTED TO THE JURY WAS SUFFICIENT FOR A DETERMINATION THAT NORFOLK AND WESTERN HAD NOTICE OF AN UNSAFE CONDITION IN THE FORM OF A SPLIT, RAISED CROSSTIE AND AS SUCH THE SUPREME COURT OF VIRGINIA'S RULING REVERSING THE

TRIAL COURT'S JUDGEMENT AND THE JURY VERDICT CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

The evidence presented to the jury at the trial of this case about Hughes' fall, the description of the crosstie on which he fell, and testimony describing ties in general was sufficient for the jury to determine the condition of the crosstie that Hughes tripped on, and to find that that condition was one that could have occurred over a period of time. Under FELA and the cases interpreting it, such evidence was properly submitted to a jury and was sufficient for a finding of constructive notice of the unsafe condition created by the "split, raised" crosstie.

This action was brought under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. The issue of the sufficiency of the evidence is this case and the jury's role in evaluating that evidence is controlled by federal law

and cases interpreting that law. Urie v. Thompson, 377 U.S. 163 (1949).

Under the FELA, "the right of the jury to pass upon the questions of fault" and whether it contributed to be plaintiff's injuries "must be liberally viewed. The jury's power to engage in inferences must be recognized as being significantly broader than in common law negligence action." Ybarra v. Bulington Northern, Inc., 689 F.2d 147, (8th Cir. 1982). In Ybarra the Court also recognized:

> In reviewing the district Court's denial of defendant's Motion for J. N. O. V. or new trial, we are not free to weight the evidence, to pass on the credibility of witnesses or to substitute our judgement for that of the jury.
>
> Instead we must view the evidence most favorable to the plaintiff and give them the benefit of all reasonable inferences to be drawn from the record.

689 F.2d at 150.

Ybarra follows a number of federal cases which have defined and preserved the jury's function in FELA cases and which have established under what circumstances a case should be decided by a jury.

In Wilkerson v. McCarthy, 336 U.S. 53 (1949), the plaintiff was a railroad worker who was injured when he walked over a wheel pit on a narrow boardway that had been permitted to become greasy, oily and slippery, causing him to fall. The railway presented evidence that it had put up safety chains and had no knowledge nor any reason to suspect that employees were still using the boardway. The trial court directed a verdict for the defendant. In reversing, this Court held that even though there was only a narrow conflict in the evidence, it was for the jury, not the trial court, to resolve. In other words, whether or not the railroad knew or should have

known of the unsafe condition was for the jury to decide. In Hughes, the Trial Court, at oral argument, read this case and found strong support for its refusal to set aside the jury's verdict.

Federal Appellate Courts have recognized over and over again that a jury can pass on questions of constructive notice and that their decisions should not be disturbed. In Beattie v Elgin,Joliet and Eastern Railway Co., 217 F.2d 863 (7th Cir. 1954), the court held that whether the defendant had actual knowledge or constructive knowledge of the alleged dangerous condition (grease and oil) of the place where the accident occurred was a question for the jury, whose determination the court should not disturb in considering the jury's verdict for the plaintiff.

In Chicago Great Western Railway Company v. Smith,

228 F.2d 180 (8th Cir. 1955), the plaintiff was on a walkway that had been made of railroad ties when he stepped on a tie that rolled, causing him to fall. The plaintiff testified that his difficulty had been with a tie crumbling. The defendant contended that the plaintiff's testimony was so incredible in light of contradictory statements, that it was entitled to a verdict as a matter of law. The court rejected the defendant's argument, holding that it is within the province of the jury to determine the credibility of the witnesses and the weight to be given their testimony. The court adopted Beattie, and stated,

> Inasmuch as plaintiff at the time of the accident was in a place where his assigned duties required him to be, defendant on the issue of negligence was chargeable with knowledge of the conditions which existed there from time to time which n the exercise of reasonable care it should have ascertained. (emphasis added.

228 F.2d at 184.

In this case, Hughes testified that as he walked the track checking the pistons, he tripped and fell. After he got up, he glanced around and saw a split, raised crosstie which protruded two to four inches above the ballast. (App 34, 45) Hughes filled out an accident report within an hour after falling and the accident report showed that he fell on the "end of a tie sticking up." (App. 48) At the close of his testimony Hughes stated that he tripped on a split cross tie". (App. 46)

Walter Eubanks, an experienced railroad employee of over twenty five years testified that crossties are used to "hold the rail in place". (App. 58) He told the jury that "a split, raised crosstie would be a crosstie that had for some reason split and was raised up and sticking up above the ballast" as opposed to a crosstie that was exposed

because the surrounding ballast was uneven. (App. 57) He explained that crossties "do not come in pieces." (App. 59) Mr. Eubanks also testified that if he saw a split, raised crosstie, he would report it to his supervisors "because it was a unsafe condition." (App. 60)

This testimony gave the jury a sufficient description of a crosstie and showed them how a crosstie was used. It also supplied them with facts regarding the condition of the crosstie that Hughes fell on and facts regarding its hazardous nature. Given this description, the jury could infer that a large piece of wood used to support tails and trains does not become split and raised overnight, but that such a condition takes place over a period of time.

The Trial Court ruled on this issue when Norfolk and Western made a Motion to Strike Hughes' evidence. The Trial Court had heard the same evidence which was

presented to the jury and recognized the jury's ability to determine notice from the evidence:

> I think that the jury can find from the evidence that something as heavy as a railroad tie would not spring up instantaneously and be in such a condition weighted down by a railroad track. I am not sure that that is beyond the range of their ability to know and infer. (App. 62-63)

The Supreme Court of Virginia reversed the judgement and jury verdict in favor of Hughes and entered final judgement in favor of Norfolk and Western because it opined that Hughes failed to present evidence from which a jury could infer that Norfolk and Western knew or should have known of the existence of the "split, raised" crosstie. The Supreme Court of Virginia's ruling on this issue applies common law principles despite its statement to the contrary. The Supreme Court of Virginia ignores the right of the jury in FELA cases to determine questions of whether or not there was constructive notice shown by

evidence presented at trial and the right of the jury to make inferences which can be fairly drawn from that evidence.

The facts presented at the trial of this case allowed the jury to infer that the condition of a split, raised crosstie does not happen instantaneously, but occurs from general decay of the tie over a period of time. With this inference the jury properly found that the railroad had constructive notice of the condition of the split raised crosstie, but failed to remedy this unsafe condition. The Supreme Court of Virginia ignored the decisions of this Court and those of Federal Appellate Courts to reverse the findings of the trial judge and the jury in this case. As such the Supreme Court committed error.

The Supreme Court of Virginia states that the jury could only speculate regarding the length of time that the

crosstie had been damaged, but the cases cited by Hughes show that such a determination can be made by a jury given the facts which were presented at trial and given their right to weigh that evidence and use their common knowledge and experience.

The Supreme Court of Virginia focuses on inspections that were performed in the area to reach its conclusion that there were no defects discovered prior to Hughes' accident and, therefore, no facts upon which a jury could infer constructive notice. The Supreme Court of Virginia is guilty of speculation. It assumes that Norfolk and Western's employees inspected for split, raised crossties and that they did not find or report any such defects. Although there was evidence presented in the form of interrogatory answers which showed that inspections were made in the area, there was no evidence as to the nature

or quality of those inspections. Norfolk and Western did not call the inspectors to testify about the results of those inspections or whether they looked for such a condition. The Supreme Court of Virginia had no facts upon which to base their assumption that there could not have been defects. However, there were facts which allowed the jury to find that the split, raised crosstie was a long standing, unsafe condition.

The Supreme Court of Virginia's ruling is contrary to this Court's decisions and those of Federal Appellate Courts which have ruled on this issue. The Supreme Court of Virginia, by its ruling, has improperly substituted its judgement for the trial judge who heard the evidence at trial and correctly ruled on this issue. The Supreme Court of Virginia has interfered with the role of the jury in this case and has substituted its judgement for

the members of the jury who sat on this case and who were given sufficient evidence to find that Norfolk and Western had constructive notice of the split, raised crosstie which caused Hughes' fall.

This Court has held that in the interest of preserving a litigant's Seventh Amendment right to trial by jury a court should reconcile the jury's verdict if at all possible. Gallick v. Baltimore and Ohio R.R. Co., 372 U.S. 108, 119 (1963). Also in Wilkerson, this Court warned that "Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function". 336 U.S. 53, 62. The Supreme Court of Virginia has violated Hughes' right to have his case decided by a jury and its decision should be reversed.

II. THE EVIDENCE PRESENTED TO THE JURY WAS SUFFICIENT TO DETERMINE THAT

NORFOLK AND WESTERN WAS NEGLIGENT FOR FAILING TO HAVE ADEQUATE LIGHTING AND FOR FAILING TO PROVIDE HUGHES WITH A SAFE PLACE TO WORK AND AS SUCH, THE SUPREME COURT OF VIRGINIA'S RULING CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

The evidence which was given to the jury in this case allowed it to find that Norfolk and Western did not provide adequate lighting in Webb, West Virginia. William E. Nelson, the engineer testified, "it is very dark at Webb, because it's in between two mountains there." (App. 66) Walter Eubanks stated, "you don't have no light there. It's between two mountains [and] ... at night there is not lighting at all." (App. 54) Hughes stated, "There is no lighting at Webb. It is dark. It is down between two hills and it is the darkest place you will ever be in on the railroad." (App. 35)

The jury was also given information by Norfolk and

Western to refute Hughes' claim that the area was dark and unsafe for walking. Trainmaster Steven D. Holman testified that brakeman were supplied with a lantern that had a six volt battery and had two bulbs. One bulb supplied a beam of light and the other supplied a light for walking. (App. 67) Hughes testified on cross examination that he did not have difficulty seeing where he was going up until the time that he was injured. (App. 41-42)

The jury received an instruction which provide in part:

> ...the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case. (App. 69)

Two cases which have been decided by this Court define the test for a jury in determining negligence in FELA cases. Schulz v. Pennsylvania R. Co., 350 U.S.

523 (1956), was a Jones Act case (a Jones Act case is controlled by FELA) for the death of a tugboat fireman who disappeared while working at night on unlighted, icy and undermanned tugboats. The trial court directed a verdict for the railroad. This Court reversed, holding that the evidence was sufficient to go to the jury on the issue of whether the railroad was negligent in failing to provide the deceased with a safe place to work.

> [T]he court below took this case from the jury because of the possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless, the jury could have so found (had the court allowed it to perform its function), but it would not have been compelled to draw such inferences, for the very essence of its function is to select from among conflicting inference and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct

statements by witnesses or proof of circumstance from which inferences can fairly be drawn.

350 U. S. at 526.

In Rogers v. Missouri Pacific Railroad, 352 U.S. 500, 506, 507 (1957), this court stated:

> Under [F.E.L.A.] the test of a jury case is simply whether the proofs justify with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their signets primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows that jury a choice of other probabilities. The statute [F.E.L.A.] expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

Given the evidence presented at trial and the trial

court's instruction, the jury had the right to determine that the lighting provided by the lantern was insufficient to provide Hughes with enough light to avoid unsafe hazards such as a split raised crosstie. The jury had a description of the lantern and its power source and knew that there was no other source of light at night to aid train personnel who regularly walked in this area. The jury had a description of the walk area and knew that Hughes did not have difficulty finding his way until he was injured on the cross tie. The jury could have reasonably inferred that the lantern was not strong enough to illuminate the crosstie. From these facts, the jury had the right to find that Norfolk and Western had not provided a safe place to work and that it was negligent for its failure to provide sufficient lighting in Webb, West Virginia.

The Supreme Court of Virginia has charged that

Hughes abandoned his theory of inadequate lighting because he failed to present evidence to show that the lantern was inadequate or that Norfolk and Western should have provided additional light for Hughes. Hughes never knowingly or implicitly abandoned or waived his claim of negligence regarding insufficient lighting and never showed an intent to relinquish it. Peterson v. S.S. Wahcondah, 331 F.2d 44, 49 (5th Cir. 1964). Hughes met his burden of proof at trial and the issue of insufficient lighting was properly given to the jury to decide. The jury in Hughes' case had sufficient evidence on this issue alone to find that Norfolk and Western was negligent. Again, the Supreme Court of Virginia has substituted its judgement for that of the jury in this case as to whether Norfolk and Western was negligent. The Supreme Court of Virginia has ignored

the decisions of this Court which protect and define the jury's role as fact finders in FELA cases and its ruling in this case should be reversed.

CONCLUSION

The evidence presented to the jury at the trial of this case was sufficient for the jury to find that Norfolk and Western knew or should have known of the presence of an unsafe condition in the form of a split, raised crosstie and that Norfolk and Western was negligent for its failure to find and repair the crosstie prior to Hughes' injury. The jury's verdict in favor of Hughes should not have been disturbed.

The evidence presented to the jury at the trial of this case was also sufficient for the jury to find that the lighting provided by Norfolk and Western in the area of Webb, West Virginia were Hughes was working was inadequate, thereby creating an unsafe place to work in violation of FELA. The jury could have properly found that Norfolk and Western was negligent on this basis

alone and their verdict should not have been disturbed.

The Supreme Court of Virginia's opinion in this case is contrary to the decisions of this Court and those of other Federal Appeals Court's which have examined these issues. For the reasons stated above, Hughes' Writ for Certiorari should be granted, and ultimately the original jury verdict should be reinstated.

Respectfully submitted,

BOBBY JOE HUGHES

By: _____
Of Counsel

APPENDIX

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

BOBBY JOE HUGHES,

Plaintiff

v. CASE NO. CL91000226

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant

ORDER

This 10th day of November, 1992 came the parties, by counsel, upon defendant's Motion to Set Aside verdict, and the same was argued by counsel.

Upon Consideration Whereof, the defendant's motion is Denied and judgement is hereby ORDERED upon the jury verdict in favor of the plaintiff in the sum of Eight Hundred thousand Dollars ($800,000.00), and his costs herein expended. The objection of the Defendant to this

ruling of the Court, for the reasons argued to the Court by the Defendant orally and in writing, is hereby noted and preserved.

ENTERED: NOVEMBER 10, 1992

_____
JUDGE

I ask for this:

_____, p.q.
Frank D. Lawrence, III

Seen and Objected to:

_____
James F. Johnson

A COPY, TESTE, ARTHUR B CRUSH, III CLERK
By _____ Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 7th *day of* January, 1994.

Norfolk and Western Railway Company, Appellant,

against Record No. 930208
Circuit Court No. C191000226

Bobby Joe Hughes, Appellee.

Upon an appeal from a judgement rendered by the Circuit Court of the City of Roanoke on the 10th day of November, 1992.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in the judgement appealed from. Accordingly, the judgement is reversed and annulled, the verdict of the jury is set aside, and final judgement is entered in favor of the appellant. The appellant shall recover of the appellee the costs expended in the said circuit court.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

Present: All the Justices

NORFOLK AND WESTERN RAILWAY COMPANY

v. Record No. 930208 OPINION BY
JUSTICE LEROY R. HASSELL
January 7, 1994

BOBBY JOE HUGHES

FROM THE CIRCUIT COURT
OF THE CITY OF ROANOKE
Roy B. Willett, Judge

In this appeal, we consider whether the evidence was sufficient to support a jury verdict in favor of the plaintiff in an action filed under the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. 51 through 60.

Bobby Joe Hughes filed this action against his former employer, Norfolk and Western Railroad Company. The case was tried before a jury, which returned a verdict in favor of Hughes in the amount of $800,000. Norfolk and Western filed a motion to set the verdict aside on the basis that the evidence failed to show that Norfolk and

Western was negligent. the trail court denied the motion and entered a judgement confirming the verdict. We awarded Norfolk and Western an appeal.

In accordance with well-settled principles, we will review the evidence and all reasonable inferences raised in favor of Hughes. Hughes was injured in Webb, West Virginia, on the night of October 14, 1988, when he was employed as a brakeman for Norfolk and Western. Around midnight, an engine unit pulled a large number of train cars from a siding track that was used to store train cars. Those cars were coupled to a group to train cars located on an adjacent track, creating a train which extended for approximately one and one-half to two miles in length.

The train engineer tested the air brakes. Then Hughes walked the length of the train to inspect visually pistons

located above the wheels on each train car. It was dark in the area because the train was situated on a track located between two mountains. Hughes used a lantern that provided illumination.

The purpose of Hughes' inspection was to ascertain whether the brakes were working properly. After he had inspected the entire train, Hughes signaled to the engineer to release the brakes. hughes began to inspect each piston again to determine whether the brakes had released.

As hughes was performing his inspection, his legs got "tired [and] fatigued," so he "stepped up on that ballast to walk a little to rest [his] legs," And he "stumbled and tripped and fell." Hughes testified at trial, "[o]nce I fell, when I first got up, my first intent was what happened, what did I fall over and I kind of glanced around and the

only thing I saw as a split cross tie sticking up."[1] After his fall, Hughes walked to the engine and told the engineer that he had fallen and hurt his arms, shoulders, elbows, and knees.

Norfolk and Western contends that the judgement of the trial court should be reversed because Hughes failed to prove that Norfolk and Western was negligent. norfolk and Western argues that Hughes failed to present any evidence that it knew, or in the exercise of reasonable care should have know, of the existence of an unsafe condition, in this instance, the "split, raised" crosstie. Hughes contends, however, that he presented sufficient evidence from which the jury could have inferred that

---

[1] A crosstie is used to support the rails. Ballast is described as gravel or broken stone that is used to provide a firm surface for the track, to hold the track in line, and to facilitate drainage.

Norfolk and Western knew, or in the exercise of reasonable care should have know, of the existence of the "split, raised" crosstie.

We analyze the merits of this appeal in accordance with F.E.L.A. as it has been interpreted by the Supreme Court, rather than looking to common law principles governing ordinary negligence action. Sabb v. Norfolk & P. Belt Line R.R., 222 Va. 19, 22, 278 S.E.2d 795, 797 (1981). Under F.E.L.A., a railroad carrier is liable whenever an employee's injury results "in whole or in part from the negligence of any of the officers, agents, or employees" of the railroad carrier. 45 U.S.C. § 51. The Supreme Court has said:

> Under [F.E.L.A.] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also

> with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute [F.E.L.A.] expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

Rogers v. Missouri Pacific R.R., 352 U.S. 500, 506-07 (1957) (emphasis in original) (footnotes omitted). We have applied this federal test in F.E.L.A. actions. Sabb, 222 Va. at 22, 278 S.e.2d at 797.

An employee in a F.E.L.A. action may rely entirely upon circumstantial evidence to meet his burden of producing evidence of the employer's negligence. Rogers, 352 U.S. at 508. Even though the standard of

proof in a F.E.L.A. action is more lenient than in a common law action, the plaintiff nevertheless in order to prevail. Hurley v. Patapsco & Back Rivers R.R., 888 F.2d 327, 29 (4th Cir. 1989).

The trial court and the litigants recognized these legal principles and, thus, the jury was given the following instructions without objections:

Instruction No. 12

> The Court instructs the jury that in order for the Plaintiff to recover, the Plaintiff must prove by a preponderance of the evidence that the Defendant knew, or, in the exercise of ordinary care, should have known that such a condition existed and that it had a reasonable opportunity to remedy the condition.

Instruction No. 13

> The Court instructs the jury that notice and knowledge to the railroad of an unsafe condition or practice may be actual notice or constructive notice. Constructive notice is that knowledge of a condition or practice the railroad should have discovered by exercising ordinary care.

Applying the aforementioned legal principles and the jury instructions, which became the law of this case, we hold that the trial court erred by entering judgement on the jury verdict because Hughes failed to present evidence that Norfolk and Western had actual or constructive notice of the "split, raised" crosstie. There is no evidence of record that Norfolk and Western actually knew of the "split, raised" crosstie. Therefore, Hughes' case rested entirely upon the theory that Norfolk and Western should have know of the existence of the "split, raised" crosstie. However, these is no evidence of record from which an inference could be drawn that Norfolk and Western had constructive notice of that unsafe condition. Rather, the evidence of record reveals that the rail tracks where Hughes fell were inspected twice each week, and that this portion of track was inspected the day before

Hughes fell and no defects were discovered. These inspections consisted of visual examination of the tracks and surrounding structures.

Hughes also claims that the jury was entitled to use its knowledge and common experience and, thus, infer that "it would take some time for a crosstie to become split and raised, which would allow time for the railroad to know of that condition." Hughes relies upon the following statement made by the trial court to buttress this assertion:

> I think the Jury can find from the evidence that something as heavy as a railroad tie wouldn't spring up instantaneously and be in such a condition weighted down by a railroad track. I am not sure that that is beyond the range of their ability to know and infer.

We find no merit in Hughes' assertion. Inferences must be based upon facts, and the record is devoid of any facts from which an inference could be drawn about the

condition of the "split, raised" crosstie or the cause of that condition. Therefore, the jury could only speculate regarding the length of time that crosstie had been damaged.

Hughes argues that even if he did not present sufficient evidence to show that Norfolk and Western knew or should have known of the existence of the "split, raised" crosstie, the trial court's judgement should be affirmed because there is evidence of an alternative basis for finding that Norfolk and Western was negligent. Hughes argues that Norfolk and Western was negligent because he was required to perform his duties in a dark area with only a lantern. We disagree.

Even though Hughes alleged in his motion for judgement that Norfolk and Western was negligent because it did not provide sufficient lighting in the area

where he fell, he abandoned this theory at trial because he did not present any evidence of inadequate illumination. It is true, as Hughes asserts, that the evidence of record shows that he was working at night in a dark area in a remote location between two mountains. The evidence of record also reveals, however, that Hughes had been provided with a lantern powered by a large six-volt battery. The lantern had two bulbs, one bulb that emitted a direct light beam and another bulb that emitted a broad light for walking.

There is simply no evidence of record from which a jury could infer that the light emitted from the railroad lantern was inadequate or that Norfolk and Western should have provided additional light for Hughes. Furthermore, when asked whether he "had any difficulty seeing were [he was] going," Hughes responded that he

had not. Accordingly, we hold that Hughes failed to present any evidence that Norfolk and Western was negligent for failing to provide sufficient lighting under the circumstances.

Because we are of opinion that Hughes failed to present sufficient evidence to support the jury's finding of negligence we do not consider Norfolk and Western's remaining assignments of error. The judgement of the trail court will be reversed, and we will enter final judgement in favor of Norfolk and Western.

Reversed and final judgement.

BOBBY J. HUGHES

was called as a witness, and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAWRENCE:

Q Bobby, would you state your full name and address, please?

A Bobby J. Hughes. Route 1, Box 141-F, Franklin Furnace, Ohio, 45629.

Q How old are you Bobby?

A Fifty-four.

Q Where were you born?

A Minnie, Kentucky.

Q how far did you go in school?

A High school.

Q Are you a high school graduate?

A Yes.

Q Would you tell the members of the Jury what you did after you got out of high school, please?

A I had several numerous jobs. I worked at construction and Sears and little odd jobs and then I went in the service and then I had a job at a bakery company for 16 or 17 months driving a bakery truck.

Q How long were you in the service, Bobby?

A Three years.

Q Were you honorably discharged?

A Yes.

Q What branch of the service were you in?

A Army.

Q Did you learn any particular trade or any sort of business or skill while you were in the Army?

A I was in the military police.

Q I guess the answer would be no, then?

A No.

Q When you got out of the service how many jobs did you have before you went to work for the railroad?

A I worked for the bakery company.

Q How long a period of time was that?

A Sixteen or 17 months.

Q When did you start with the railway company?

A I hired in, I believe it was June 29, 1962. Then

I had a break from the time I hired in because I was just a new trainee and I worked a couple days and then I was laid off until November and from November on I was pretty well there.

Q That would have been since November of 1962?

A Yes.

Q What was your job description or title when you first hired on the railroad?

A Brakeman.

Q Did you have any other job titles during your employment with the railroad?

A I was a fireman for a few months.

Q Any other?

A Conductor.

Q What is your occupation now?

A I am not working.

Q Back to when you were employed in October of 1988, were you employed by the Norfolk and Western at that time?

A Yes.

Q Where were you stationed?

A From Portsmouth to Williamson, West Virginia.

Q What was your job title?

A Brakeman.

Q Did you hold seniority on the conductor's roster at that time?

A No.

Q Were you at one time a conductor?

A Yes.

Q How long were you a conductor?

A I don't remember the date of my promotion. I really don't remember.

Q On October 14, 1988, would you tell the members of the Jury who you were working with.

A I was working with Conductor J. R. Kelly and Engineer W. E. Nelson.

Q What was your job?

A Brakeman.

Q What were you going to do that day?

A We were called out from Williamson, West Virginia, to pick up on the line at Webb, West Virginia, and then proceed on to Portsmouth, the best I can

remember.

Q Bobby, you have sat here while various and sundry people have referred to this on numerous occasions. Did you prepare this?

A Yes.

MR. LAWRENCE: At this time I would like to have marked as Plaintiff's Exhibit Number Six, please.

THE COURT: Marked and exhibited and admitted into evidence.

(Diagram was marked as Plaintiff's Exhibit Number Six and entered into the Record.)

BY MR. LAWRENCE:

Q Bobby, I would like for you to go through and

point out and explain to the members of the Jury what you and your crew were going to do on that night of October 14, 1988.

A We left out of Williamson, West Virginia, on the westbound train and we came down to Webb, West Virginia. We cut our train off on the main left.

Q Slow down a little. When you say you cut off a train, what do you mean by that?

A Left our westbound cars that we had back of the engine. We cut them off and left them on the westbound track.

Q Then you proceeded to do what?

A Proceeded west of the switch at Webb and throwed the switch.

Q Do you remember who threw the switch?

A No, sir, I don't.

Q What happened next?

A After throwing the switch we backed into the siding and coupled the cars and once we coupled the cars I had to walk the cars off.

Q Where were you walking the cars off?

A Between the westbound and the siding.

Q Did you pull the cars out of the Webb siding and couple with your train?

A Yes.

Q How did you do that?

A Well, after we got our air we proceeded west out of the switch. Once we got out of the switch we lined the

switch over, backed up and coupled the cars and was --

Q What was your duty after you had coupled to your main line train?

A My duties at that time was to see that the proper air test was made, that we had the air on the cars and I walked to the rear of the train and made air tests with the engineer.

Q You need to slow down a little bit for me, if you would. How do you make the air test? What do you look for?

A We have to get 60 pounds of pressure and once we get the pressure then the engineer applies the brake and we see the if pistons come out on the cars and that means that the brakes are applied.

Q Where are the pistons located?

A Either on the east or west end of the car up in the frame of the car.

Q How far off of the ground are they?

A I couldn't tell you for sure because I haven't ever measured it. I was trying to think of where a car would strike me. Probably a piston would strike somewhere along in here.

Q Are the pistons located where the wheels are?

A Above the wheels.

Q What does the piston do, do you know?

A I don't really know what the pistons has to do with the brake. If they apply the brakes the piston comes out and they release it and the piston goes in.

Q What was the first thing you did after you coupled to the train on the main line?

A I started to walk to the rear of the train.

Q What direction would that have been?

A That would be walking east on the westbound.

Q That would be this track?

A Yes.

Q Your purpose in walking back was to do what?

A To check the air pressure on the rear.

Q And you did that by checking how?

A We have an indicator on the rear of the train that has -- we have gauges sometimes and if the brake is released on the rear, if they have been tested, the piston goes in. We wait sometimes a reasonable amount of time

and then we apply the brakes.

Q After the coupling you walked to the end of the train, were you checking brakes?

A Yes, I watched them as I went back.

Q Then when you got to the back what did you do?

A I told the engineer to set the brakes up.

Q What happened next?

A He set the brakes up and I told him that the brakes applied.

Q What was your next duty? What were you supposed to do?

A After he had released the brakes my duty was to walk from the rear to the head end, check the brakes to see if they had all released.

Q How long of a distance would that be?

A Between a mile and a half and two miles.

Q What would the ground surface be like?

A It was uneven. Your ballast is high in some places, low in others, so you are walking like in a cow pasture, on the side of the hill most of the time.

Q And the ballast, we have heard testimony, were rocks?

A Yes.

Q As you proceeded on, on your diagram, Plaintiff's Exhibit Six, where was your train as you were walking?

A On the westbound track.

Q As the train is sitting on the westbound track was it possible for you to continue past what you have marked

as the creek on the westbound track?

A No.

Q What did you have to do?

A I had to cross over. Once I got here, I had to cross over and get on the eastbound and walk across the railroad bridge on the eastbound, between the rails.

Q As you were walking on the eastbound track were you also checking the brakes?

A Yes.

Q Would you describe for the members of the Jury how you did it?

A How do I check for the brakes?

Q Yes, sir.

A As you walk along you have to, especially at

night, you have to raise your lantern up to shine it on the pistons to see whether they have released. That means the brakes has released on that car, and you just continue walking and check them as you go.

Q Would you tell the members of the Jury how you were injured, please?

A As I was proceeding west, checking the train, once I got across the railroad bridge, I stepped down between the two tracks and I checked the brakes as I continued to walk toward the head end.

And after you have walked for a mile or whatever, kind of sideways on the hillside, your legs get tired, fatigued, and on the eastbound where it was surface and everything, the ballast seemed to be pretty level so I

stepped up on that ballast to walk a little to rest my legs, and I stumbled and tripped and fell.

Q Describe your fall for the members of the Jury, please.

A As I fell -- I think in maybe my deposition to Mr. Johnson I said I fell in a spread eagle position. I got confused with spread eagle and prone position. It was between both, but as I fell I caught myself on my arms and hands like this, and then my hands give and I scooted on my arms and my knees.

Q What did you hurt?

A I hurt my arms, shoulders and elbows and my knees.

Q What part of your arms did you hurt?

A Well, like now they hurt through here and my shoulders and this one was scratched up and my elbow.

Q After you fell, Bobby, did you continue to work?

A Yes.

Q What did you do next? Did you finish your job?

A Yes; I went to the engine. Once I fell, when I first got up, my first intent was what happened, what did I fall over and I kind of glanced around and the only thing I saw was a split cross tie sticking up.

Then I proceeded on to the engine and when I got on the engine I told the engineer that I had fell and hurt myself and I showed him where I hurt myself and then I went back to the second unit where the conductor was out and told him I got hurt and I needed to fill out a CT, an

accident report.

Q Bobby, let's back up a little. At the time you fell would you describe for the members of the Jury if there was any lighting out there and if there wasn't what was the area as far as the darkness went?

A There is no lighting at Webb. It is dark. It is down between two hills and it is the darkest place you will ever be in on the railroad.

Q Is there any rule, Bobby, that would have prevented you from walking where you were walking?

Not that I know of.

Q Was it within the normal course of your duties of checking the brakes to be where you were?

A Yes.

Q You testified you told the conductor that you needed to fill out a CT form. What is that?

A That is an accident report.

Q Let me, if I may, show you a document. First let me ask you if you recognize it as to what the form is?

A Yes, this is a CT form that I filled out.

Q That is the one that you filled out?

A Yes, sir.

Q What did you do with it after you filled it out?

A The best that I can remember, we sent it to the dispatcher.

Q And you turned it over to the railroad?

A Yes.

Q That was notification of your injury?

A Yes.

MR. LAWRENCE: Your Honor, I would like to have this marked as Plaintiff's Exhibit Number Seven, please.

THE COURT: Any objection?

MR. JOHNSON: No, Your Honor.

THE COURT: You are moving it in as well as marking it?

MR. LAWRENCE: Yes, sir.

THE COURT: It is accepted into evidence as Plaintiff's Seven.

(Accident Report was marked as Plaintiff's Exhibit Number Seven and entered into the Record.)

BY MR. LAWRENCE:

Q Bobby, I am going to hand what has been marked as Plaintiff's Exhibit Number Seven. How soon after you fell did you prepare that report?

A I would say within half an hour, 45 minutes.

Q Did you put on the report why you fell or what you tripped on?

A It says the end of the tie sticking up was the only thing I saw.

Q Is that your recollection of what you tripped on?

A Yes.

Q Bobby, at that point did you seek any medical attention?

A No.

Q Why did you not seek any medical attention?

A I have been hurt numerous times on the railroad and I have just worked through them.

Q Did you finished that night?

A Yes.

Q Did you work any days thereafter?

A Yes.

Q Did you have occasion during the course of your employment to tell any railroad official of your injury shortly afterwards?

A Yes.

Q Who did you tell?

A Mr. Holman, trainmaster, Kenova, West Virginia.

Q Do you know what Mr. Holman may have done,

your own personal knowledge?

A He filled out a report also.

B. J. Hughes - Cross

A Yes.

Q And you did have with you, I presume, the lantern that had been furnished to you to use during night work?

A Yes.

Q And you had it on, I presume?

A Yes.

Q As a matter of fact, at the time you fell the lantern was on, wasn't it?

A Yes.

Q It is true, isn't it, that at the time you say you tripped you had already walked by all but 25 to 30 of the cars?

A Approximately, yes, sir.

Q So you had already checked 125 to 150, approximately, of the cars in the train?

A Yes.

Q And you did not experience any difficutly doing that, did you? Until you got to the point where you tripped?

A No; the ballast was uneven before I got there.

Q You did not trip at any other time, did you?

A No.

Q And it was dark the whole time you were doing

this job, wasn't it?

A Yes.

Q You say you did not trip prior to the time that you say you hurt yourself?

A No.

Q So you had not had any difficulty seeing where you were going well enough to avoid tripping up until that time, had you?

A Right.

Q When you say you did trip, you were walking, as I understand it?

A Yes.

Q And you say that you caught yourself with your hands?

A Yes.

Q Was I right when I told the Jury earlier that I understood that your body, itself, never hit the ground?

A The best I can remember, no, sir.

Q You broke your fall by catching yourself?

A Yes.

Q You indicated that you filled out a report. You called it a CT, but it actually has got Form Number 11131 at the top. That is what you meant, wasn't it?

A Yes.

eastbound track?

A Yes.

Q That was the rack to your left as you were walking towards the engines, wasn't it?

A Yes.

Q You admit, don't you, that you did not see the tie before you tripped?

A No.

Q So at the time you fell you did not know what you tripped on, did you?

A No.

Q The first time you saw the tie was when you were getting up off the ground, wasn't it?

A When I got up or I had just gotten up. It is only natural to look around and see what happened. I just flashed my light around and that was the only thing I could see.

Q And whatever condition it was in when you

flashed your light at it, you didn't have any trouble seeing, did you?

A No.

Q How far did you say the cross tie protruded up above the ballast?

A Two to four inches.

B. J. Hughes - Redirect

C. E. Craft. Who is the Craft that you know?

A The only Craft I know is in the Claims Department in Portsmouth.

Q Do you know a Mr. D. R. Hutchinson?

A No.

Q In fact, let me show you another copy of the letter, if I may, please. These people, were they on your letter?

A I really don't remember.

Q Bobby, today, to your best recollection, what did you trip on?

A Split cross tie.

MR. LAWRENCE: I don't have any other questions.

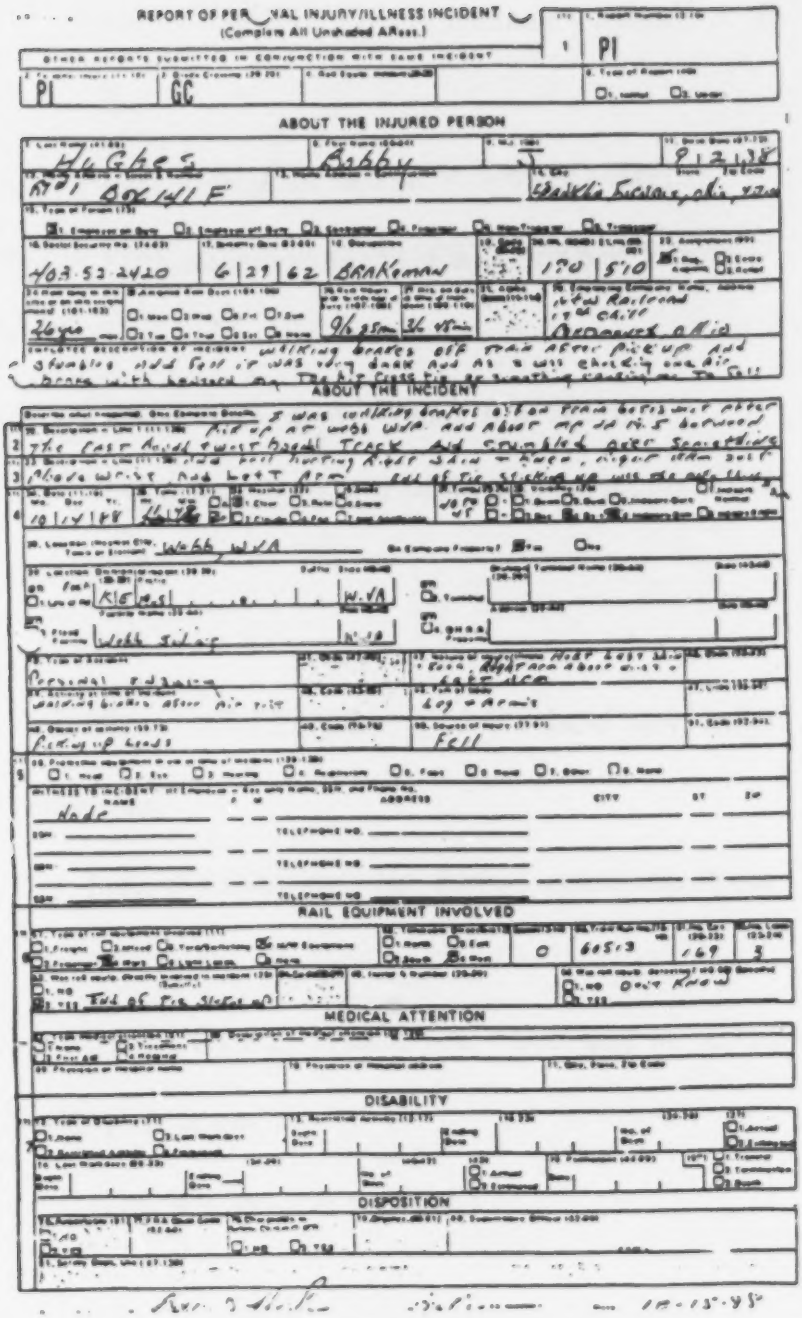
MR. JOHNSON: No further questions, Your Honor.

THE COURT: Thank you. You may be seated with your attorney.

(The Witness was excused.)

THE COURT: Maybe we should take a brief break. We will take a 10-minute recess.

(A recess was taken. Following the recess the following took place out of the presence



REPORT OF PERSONAL INJURY/ILLNESS INCIDENT
(Complete All Unshaded ARess.)

OTHER REPORTS SUBMITTED IN CONJUNCTION WITH SAME INCIDENT

PI | GC | PI

ABOUT THE INJURED PERSON

HUGHES | BOBBY | T | 9-2-38

401 OAKHILL F | Parkville Kansas, KS

403-52-2420 | 6/29/62 | BRAKEMAN | 180 | 5'10"

26 yrs | 9/25 | 36 | Mo. Railroad

ABOUT THE INCIDENT

10/17/78 | Webb, W.Va. | W.VA | Webb Siding

Personal Injury | Walking brakes after pick up | Right arm above wrist | Log of Accounts | Pickup Goods | Fell

Nade

RAIL EQUIPMENT INVOLVED

0 | 6513 | 169 | 3

Top of Pick Stake

MEDICAL ATTENTION

DISABILITY

DISPOSITION

10-13-78

Plaintiffs' Exhibit 7

App. 48

BEST AVAILABLE COPY

Will you call you next witness, Mr. Lawrence?

MR. LAWRENCE: You Honor, I would like to read certain interrogatories, if I may, please.

MR. JOHNSON: Which ones are they?

MR. FORBES: I will read Interrogatory Number Eight and Interrogatory Number Nine.

And if I may tell the Jury that an interrogatory is a written question that we have asked of the defendant, and I will read to you the defendant's response.

Interrogatory Number Eight that the plaintiff propounded to the defendant reads: "Did the defendant within one year before or at any time after the accident involved herein make any inspections, tests or measurements of the area or equipment involved in such accident or any re-enactments, and if so, list and identify any person making such inspections, tests or re-

enactments.

"Describe any such inspections, tests or re-enactments as to the exact nature of such inspections, tests, or re-enactments.

"State the results of any such inspections, tests or re-enactments. Attach a copy of the findings for each with the date made, the name and the address and the classification or occupation of the person in possession of such record or report.

"If any information has not been reduced to writing, identify the person who has knowledge of the information."

The defendant's response to Interrogatory Number Eight that was just read was originally "No." There was a supplemental interrogatory that was filed that is from the defendant answering --

MR. JOHNSON: If You Honor, please, I need to object to that because the answer was amended, not supplemented, so it is the amended answer.

THE COURT: It is an amended answer anyway rather than an interrogatory.

MR. LAWRENCE: The amended answer in response to Number Eight reads as follows.

"During the year preceding the incident and continuously since the tracks were and have been inspected twice each week, parentheses, on Mondays and Thursdays, parentheses, in compliance with FRA requirements.

"The inspections consisted of visual examination of the tracks and surrounding structures generally by means of high rail vehicles.

"Records pertaining to the FRA required inspections

are maintained for only one year and therefore are not available for the relevant time period."

Interrogatory Number Nine that the plaintiff propounded to the defendant reads as follows: "Did the defendant within one year before or at any time after the accident involved herein make any change in, repair of, or perform work upon the area or equipment involved in such accident.

"And if so, list and identify each such change in repair of, or work, the date made, the name, address and classification or occupation of the person or persons making the same, and if a record or report was made, the name, address, classification or occupation of the person in possession of such record or report and produce all such written materials."

The defendant's original answer to the plaintiff's

interrogatory was "No." An amended answer to plaintiff's interrogatory was filed by

Eubanks - Direct

Q Is there anything in this particular area like a creek or water of any nature?

A Yes.

Q Where would that be, sir?

A It would be just to the left of the switch.

Q If you were on the west main line is it possible, if there were cars standing here, to proceed along that area? Can you walk alongside the track?

A To cross the bridge, the only way you can get across it, even if there are no cars on either track, is to walk between your rails to get across the bridge.

Q If there were cars sitting on the westbound track, where would you have to cross, sir?

A You would have to cross the eastbound track.

Q Is that the lower track?

A Yes, sir.

Q If you crossed this bridge, can you walk across there without walking between the rails?

A No, sir.

Q Can you tell the members of the Jury what is the lighting like in this area?

A You don't have no light there. It sets between two mountains and a river just to the south of the eastbound track there, and with a mountain on the other side of there and at night there is no lighting at all.

Q Do men normally and usually work in this area?

A Yes, sir.

Q How often, sir?

A Daily.

Q What is the purpose of the Webb siding?

A To store cars.

Q Why do they store them?

A They don't need them at that particular time.

Q Have you ever walked this train after you have pulled out of the Webb siding?

A Many times.

Q Where would you do your walking after you passed across the bridge, sir?

A Well, I would go back -- try to go back on the

south side of the eastbound track as much as I could.

Q What is ballast, Mr. Eubanks? Would you tell the members of the Jury that, please?

A Ballast is like a stone, like you use in your driveway, but it is big and they put it under the tracks in order to have good drainage.

Q Is there ballast on both of these tracks, both eastbound and the westbound in Webb?

A Yes, Sir.

Q How would you classify the ballast? Is it level, even, or how would it be, sir?

A Your ballast sets up fairly high and you would have to be walking on like a bank, a small bank going back.

Q Can you tell the members of the Jury what a split raised cross tie is, Mr. Eubanks?

A A split raised cross tie, that would be a cross tie that had for some reason split and was raising up and sticking up above the ballast.

Q Mr. Eubanks, I am going to show you what is an artist's rendition. This is not a purport that it is anything that was related to Bobby Hughes' case but I would like for you to look at this --

MR JOHNSON: If You Honor, please, I want the Record to reflect, for Record purposes, the objection to the use of the document.

THE COURT: All right.

MR. LAWRENCE: This will be in accordance

with your ruling, Your Honor.

THE COURT: Right.

By MR. LAWRENCE:

Q First off, would you point out, Mr. Eubanks the ballast, if there is any, in this area?

A Right here is your ballast.

Q And that is the rock that you were talking about?

A Yes, sir.

Q Would you point out to the members of the Jury, what is a cross tie, please?

A These are cross ties.

Q What is the purpose of the cross tie?

A To hold the rail in place.

Q What would you classify this, sir?

A I would classify that as a raised cross tie.

Q And is that a split cross tie? I mean, cross ties don't come in pieces like that, do they?

A Right, they don't come in pieces.

Q Mr. Eubanks, in addition to working on the railroad as a brakeman, did you ever have any occasion to hold a Union office, sir?

A Yes, sir.

Q Would you tell the members of the Jury what Union office you have held?

A I was a Local Chairman, I was State Legislative Representive and I was the General Chairman.

Q As a Local Chairman, what would be your duties, sir?

A Representing the men at investigations and enforcement of the contract.

Q As a Local Chairman or as a brakeman during the course of your duties, if you saw a split raised cross tie, what would you do, sir?

A I would turn it into the railroad.

Q Who would you report it to?

A Supervision.

Q Why would you report it, sir?

A Because it was an unsafe condition.

Q Are you aware of any regular inspections that are done in the track area in Webb, West Virginia?

A Yes; we hear all the time on the radio --

Q Don't tell me what you heard from anyone other

than your own knowledge. Do you know that inspections take place?

A Yes.

Q Do you know why inspections take place?

A To conform with the FRA regulations and to detect unsafe conditions.

Q Within your knowledge, would that be something subject to inspection?

MR. JOHNSON: If Your Honor please, this is

with constructive notice, that they are doing inspections and it is a safety hazard and it shouldn't be there.

That is why they have twice a week safety inspections

on Tuesday and Thursdays, to find these defects. I think it is a Jury question, Your Honor, and I ask you to submit it to the Jury.

MR. JOHNSON: You Honor, Mr. Lawrence did not address the absence, the complete absence of any evidence as to how long this alleged defect had existed.

There is no evidence that an inspection saw or should have seen the tie because there was no evidence as to when that defect came into existence. That is the fatal shortcoming of the case.

THE COURT: The motion is overruled. I think it is a close case, but in a comparative negligence case there is, based on his own testimony, negligence on the part of the plaintiff, but this is a comparative negligence case.

I think the Jury can find from the evidence that something as heavy as a railroad tie would spring up instantaneously and be in such a condition weighted down by a railroad track.

I am not sure that that is beyond the range of their ability to know and infer. In any event, I find a prima facia case has been made and it should go the Jury. Your exception is noted.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: It is not necessary for me to say that every time, but to save the Record I try to do it. Do you have additional evidence, Mr. Johnson?

MR. JOHNSON: Yes, Your Honor, I do. I guess the first thing I want to do, let me check, is let's read the

Sherfey deposition, unless we can stipulate the bottom line figures.

Then I will call one additional witness, Your Honor.

THE COURT: All right, sir. Let's give them to a quarter till and we ought to be able to finish easily before noontime, shouldn't we?

MR. JOHNSON: Absolutely.

THE COURT: We will recess until a quarter to 11:00.

Q Why was he walking the hundred cars, sir?

A Because we have no cab and he has to walk to the

head end there to make the coupling.

Q Did you become aware that Mr. Hughes was injured at any time?

A Yes, I did. When he come over to the head end, he got on the head unit with me and showed me that both his hands was skinned and both his knees was skinned and his coat was tore.

Q All right. Did you get off the engine to go see where he had fallen?

A No, I did not. The engineer does not leave the engine at any time.

Q All right. To you knowledge, did he fill in an accident report?

A I do not know what he did.

Q All right. What was the lighting like in that area that night, sir?

A It is very dark at Webb, because it's in between two mountains there.

Q Okay.

"MR. LAWRENCE: Mr. Nelson, I thank you, sir. Would you answer Mr. Johnson's questions.

"THE WITNESS: All right.

Q What kind of equipment, if any, is issued to them to assist them in seeing at night?

A Each trainman is issued a railroad lantern that contains one large six-volt battery and it had two bulbs on

it.

It has a beam type of, where it makes a beam, and then it also has another switch which when you switch it over, it gives broad light for walking.

MR. JOHNSON: No further questions, Mr. Holman.

CROSS EXAMINATION

BY MR LAWRENCE:

Q Mr. Holman, you received word from someone, but you not sure who it was, that Bobby Hughes tripped or was injured in the Webb siding area and in the early morning after dark you went to Webb to make an inspection; is that correct, sir?

A I went to Webb the following morning.

Q All right, sir. To make an inspection, that is part of your duties as a company official; is that correct, sir?

A Yes, that is correct.

INSTRUCTION NO. 11

The Court instructs the jury that it was the continuing duty of the Defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the Plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work; the Defendant railway company was not required under the law to furnish the Plaintiff a place to work which was absolutely safe. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the

evidence in the case.

Supreme Court, U.S.
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(2)

No. 93-1614

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOBBY JOE HUGHES,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Virginia correctly ruled that, under the law of the case, the evidence presented no jury issue on the question of respondent's negligence because no evidence existed from which the jury could conclude that respondent knew, or in the exercise of ordinary care should have known, that the assertedly dangerous condition existed, or that respondent had a reasonable opportunity to remedy the condition?

2. Whether the Supreme Court of Virginia correctly ruled that the evidence presented no jury issue on a claim of negligent failure to provide adequate lighting, and moreover that petitioner had abandoned any such claim at trial?

RULE 29.1 LISTING

Respondent's parent corporation is Norfolk Southern Railway Company, whose parent is Norfolk Southern Corporation. Respondent has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the Norfolk and Western Railway Company ("NW"), respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Supreme Court of Virginia's opinion and judgment in this case.

OPINION BELOW

The opinion of the Supreme Court of Virginia (App. 5-16) is reported at 247 Va. 113, 439 S.E.2d 411 (1994).[1]

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[1] The transcription of the Supreme Court of Virginia's opinion in the appendix to the petition contains one major omission and several errors. The sentence that bridges App. 10-11 should read: "Even though the standard of proof in a F.E.L.A. action is more lenient than in a common law action, the plaintiff nevertheless *is still required to establish some act of negligence* in order to prevail." The first line on App. 8 should read: ". . . only thing I saw *was* a . . ." The tenth and eleventh lines on App. 12 should read: ". . . should have know*n* of the existence . . . . However, th*e*re is no evidence. . . ." [The italics show the corrections.]

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Bobby Joe Hughes ("Hughes") sued NW in the Circuit Court for the City of Roanoke, Virginia, under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, which creates a cause of action in favor of a railroad employee claiming to have suffered injury "resulting in whole or in part from the negligence of" his employer. (R. 1-3.)[2]

At trial, NW moved the court to strike Hughes' evidence (equivalent to a federal Rule 50(a) motion for a directed verdict) at the close of Hughes' evidence and at the conclusion of all the evidence on the ground that the evidence failed as a matter of law to raise a jury issue as to NW's negligence. Both motions were denied. (Tr. II.55-60, 97.) The jury awarded Hughes $800,000.00. (Tr. II.104, R. 276.) The trial court denied NW's post-trial motion, made on this same ground, to set aside the verdict and enter final judgment for NW (equivalent to a federal Rule 50(b) j.n.o.v. motion). NW's alternative motion for a new trial, based on a major evidential question and on the asserted excessiveness of the verdict, was denied. The trial court entered judgment on the verdict. (R. 292-94; App. 1-2.)

The Supreme Court of Virginia granted NW's petition for appeal on the issues of the sufficiency of Hughes' proof of negligence, the evidential ruling, and excessiveness. In a unanimous opinion, that court reversed and entered final judgment for NW on the ground that the evidence failed, as a matter of law, to raise a jury issue regarding NW's negligence. (App. 5-16.) In light of

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[2] The record on appeal was hand numbered by the Clerk of the trial court in accordance with Virginia practice, and it will be cited by page number, *e.g.*, R.1. Each volume of the two-day trial transcript is separately paginated and will be cited by volume number and page, *e.g.*, Tr. I.1.

this disposition, the Virginia Supreme Court found it unnecessary to address the grounds for a new trial urged by NW. (App. 16.)

B. The Evidence on Liability.

Hughes claimed that he was injured on the night of October 14, 1988, while working as an NW brakeman on tracks located in Webb, West Virginia. The tracks at Webb consist of the eastbound and westbound main lines and a single siding situated between the main lines. The west end of the siding connects with the westbound main line at approximately milepost 19. (Pl. Exh. 6; Tr. II.80.) Shortly before midnight, Hughes' train crew pulled a string of cars from the siding and coupled them onto a string standing on the westbound main track, making a train one and a half to two miles long. (Tr. I.84-85, 87). The engineer applied the airbrakes as a test. Hughes, who had worked for NW for 26 years, most of that time as a brakeman (Tr. I.81-83), then performed his brakeman's duty of walking the length of the train eastward to inspect the piston above the wheels on each car that revealed, by its position, whether the brakes were engaging. He reached the east end of the train, signaled the engineer to release the brakes, and started back, once more checking each piston to determine whether the brakes had released. (Tr. I.85-87.)

Until the moment of his fall, Hughes performed these duties by walking in the area between the westbound main line on which the cars were located and the adjacent track, except at one point toward the west end of the area, where the tracks crossed a stream, Hughes had to walk on the bridge for the eastbound main line as it spanned the stream. (Tr. I.88-89.) It was dark in the area, and Hughes used his NW-issued lantern to light his way and inspect the pistons. His lantern had two bulbs, one providing a focused beam and the other casting a broad light for walking. (Tr. I.88-89, 91; Tr. II.84.)

Hughes testified at trial that, after he had walked for a mile or more back westward toward the head of the train, crossed the stream, and returned to the area between the tracks, his "legs g[o]t tired, fatigued, and on the eastbound where it was surface and everything, the ballast seemed to be pretty level so I stepped up on that ballast to walk a little to rest my legs, and I stumbled and tripped and fell." (Tr. I.89.) Hughes caught himself on his arms and hands but then "scooted" on his arms and knees. (Tr. I.89.) Hughes testified that he did not see anything before he fell, but that he looked back by lantern light afterwards and only then saw the condition to which he ascribed his fall. (Tr. I.114.)

Hughes got up and finished walking the length of the train. He then reported to the engineer and conductor that he had fallen and filed an incident report. (Tr. I.90.) On that report form, which Hughes himself filled out (Tr. I.91, 113), he described the incident as follows:

> Walking brakes off train after pickup and stumbles and fell[;] it was very dark and as I was checking one airbrake with lantern my toe hit crosstie or something causing me to fall . . . I was walking brakes off on train 60513 west after pickup at Webb W. Va. and about MP [milepost] No. 19.5 between the east bound and west bound track, and stumbled over something and fell hurting right shin and knee, right arm just above wrist, and left arm, end of tie sticking up was the only thing I saw.

(Pl. Exh. 7.) In answer to a question on the form about whether rail equipment was directly involved in the incident, Hughes responded, "end of tie sticking up." To the question, "Was rail equip. defective?," Hughes answered, "Don't know." (Pl. Exh. 7.)

Hughes reported the incident verbally to Mr. Holman, the trainmaster for this district, within a few hours after the incident and before Hughes went off duty. (Tr. II.77-78.) Hughes told Holman that "he was walking between

the middle track at Webb and walking westward" and he had "slipped on or tripped over . . . a piece of a tie sticking up between the tracks or something, is what he said. He didn't really—wasn't certain of what it was, but he assumed it was a piece of tie." (Tr. II.79.) Based on this communication, Holman also filled out a report form. (Pl. Exh. 9.)

Hughes told Holman, and Holman recorded, that the accident occurred at milepost 19. (Tr. II.79-80, Pl. Exh. 9.) Hughes also told Holman that the accident occurred at the west switch at Webb, while he was walking between the middle (siding) track and the westbound main line.[3] (Tr. II.79-80, 87.) This information also located the incident near milepost 19, because the west end of the siding connected with the westbound main line at that point. There was no siding track farther west, toward milepost 19.5. (Tr. I.87-88; II.79-80, 87; Pl. Exh. 6.) On his own report form Hughes had identified the location of his fall as milepost 19.5, but Holman did not know this at the time. Holman never saw Hughes' report until his deposition a few months before trial. (Tr. II.87-88.) Hughes did not tell Holman that he was up on the eastbound main line itself when he was hurt, although that was his testimony at trial. (Tr. II.86.)

Holman waited for daylight and went to Webb to inspect the area where Hughes fell in order to find and remove the tie and prevent other injuries. (Tr. II.79-80.) Holman came into the Webb facility from the west end and inspected the area "where Mr. Hughes indicated to me that he had fallen," as well as walking the entire length of the track on both sides, looking for something that might have caused Hughes to fall. (Tr. II.81-82.) Holman testified, "I did not find anything which I felt

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[3] In railroad terminology, "between the tracks" is not equivalent to "between the rails of a track." For safety reasons, established railroad rules prohibit railroad workers from walking between the rails of a track except when their duties absolutely require such action. (Tr. I.62-64.)

would cause anybody to trip. I found it to be a normal railroad walking condition." (Tr. II.82.)

At trial Hughes said that he tripped over a "split" crosstie located on the eastbound main line, rather than in the area between the tracks as he had stated on his own report form and had told Holman. (Tr. I.90, 113-14, 134.) Hughes was not certain that he had tripped over the tie he claimed to have seen:

> Q. Are you telling us now, though, that you are sure that it was the end of that particular crosstie that you saw that you tripped over?
>
> A. I am telling you now that is the only thing that I saw that night. (Tr. I.113.)
>
> * * *
>
> I just flashed my light around and that was the only thing I could see. (Tr. I.114.)
>
> * * *
>
> . . . For me to say one hundred percent for a fact that that split crosstie I saw was definitely it, I would not swear to it. But that was the only thing that I saw. (Tr. I.116.)
>
> * * *
>
> . . . The only thing I saw was the split crosstie. (Tr. I.117.)

The sole description at trial of what Hughes assertedly saw after he fell was as follows:

> Q. How far did you say the crosstie protruded up above the ballast?
>
> A. Two to four inches.

(Tr. I.114.) Hughes did not quantify how much of the offending railroad tie was "split." He did not indicate whether or how far the "split" portion protruded above the remainder of the tie. Hughes did not indicate whether the differential between the crosstie and the ballast represented a differential between a flat tie end and a de-

pressed ballast level, or represented a tie end, some or all of which was unnaturally protruding above ballast that would otherwise have been even with a flat tie end. Hughes admitted that having "ballast not being exactly even with the ends of the crossties" is not unusual and that "we see that quite often." (Tr. I.115.)[4]

The record contains no evidence suggesting that NW actually knew of the existence of the split tie that Hughes claimed to have seen briefly after he fell. No one, including Hughes, saw the condition before Hughes' accident. (Tr. I.114.) No one saw Hughes fall. The condition Hughes described could not be located afterwards. Hughes introduced no photographs of the condition and produced no witness to corroborate its existence. The record contains no evidence relating in any way to when the condition described by Hughes arose, how long it had existed, or what caused the condition to exist.

During the year preceding October 14, 1988, and continuously since then, the NW tracks at Webb were inspected twice each week, on Mondays and Thursdays, in compliance with Federal Railway Administration requirements. These inspections consisted of visual examination of the tracks and surrounding structures. (Tr. II.14-16.) Although Hughes did not prove the day of the week upon which the incident occurred, the calendar shows that October 14, 1988, was a Friday. Additionally, scheduled maintenance by system production gangs had been performed on the eastbound main line track at Webb in June 1988, some four months before Hughes fell. (Tr. II.16-17.)

At trial, one of Hughes' witnesses testified that an artist's drawing (the use of which gave rise to the evidential issue underlying NW's motion for a new trial) depicted a "split raised crosstie." (Tr. I.56-57.) The witness, a former brakeman and union officer, testified that

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[4] Ballast is crushed stone used under and near railroad tracks to facilitate drainage. (Tr. I.55.)

he would report a "split, raised crosstie" to the railroad as an "unsafe condition." (Tr. I.58.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT RAISE EITHER OF THE QUESTIONS PRESENTED IN THE PETITION.

In his Questions Presented for Review, petitioner effectively asserts that the Supreme Court of Virginia improperly imposed on his case its own common law standards regarding notice of a defective condition and negligence, rather than the proper federal standards. *See also* Pet. at 21. This assertion is not accurate.

All parties and all courts have unwaveringly acknowledged that the question of NW's potential liability in this case is governed by federal law. That proposition is indisputable. The case was briefed and argued at all levels on this basis. Nothing in the Virginia Supreme Court's opinion in any way suggests that anything other than the proper federal standards were applied in this case. The Virginia Supreme Court expressly acknowledged its complete reliance on the governing federal standards, rather than common law principles. (App. 9-11.) Petitioner has not pointed, and cannot point, to anything in the opinion below that raises the questions he would have this Court review.

Petitioner's Questions Presented, moreover, do not frame realistic issues that could merit this Court's attention. Even *if* the common law imposed higher standards for notice of a defective condition and negligence than the governing federal law—a proposition petitioner does not and, NW believes, cannot demonstrate—no court and no party in this case has advocated changing the governing federal law. Simply put, petitioner's Questions Presented do not exist in this case.

Regarding the "standard of notice" applied here (petitioner's Question Presented No. 1), petitioner omits to

mention that this element of his case was established through instructions Nos. 12 and 13, which were given without objection at trial and which thus became the law of the case:

Instruction No. 12

> The Court instructs the jury that in order for the Plaintiff to recover, the Plaintiff must prove by a preponderance of the evidence that the Defendant knew, or, in the exercise of ordinary care, should have known that such a condition existed and that it had a reasonable opportunity to remedy the condition.

Instruction No. 13

> The Court instructs the jury that notice and knowledge to the railroad of an unsafe condition or practice may be actual notice or constructive notice. Constructive notice is that knowledge of a condition or practice the railroad should have discovered by exercising ordinary care.

(R. 172-73; App. 11.) In oral argument before the Virginia Supreme Court, petitioner's counsel expressly conceded, in response to a question from the bench, that the instructions were an appropriate statement of the governing law. In his argument, petitioner never articulates any alternative, assertedly more "proper" notice standard. Instead, he argues that his evidence was sufficient to meet the burden he accepted under the instructions. That is not the issue he poses for this Court's review, however.

Petitioner's second Question Presented involves the "standard of negligence" appropriate in an FELA case. Once again, petitioner neglects to mention that the standard governing this case was established in instructions given without objection. Those instructions plainly were correct, which is why petitioner had no objection to them, and why he fails to articulate any different standard of negligence for this Court's consideration. Once again, petitioner instead argues that he presented sufficient evidence of negligence—which is not the issue he raises.

Petitioner improperly invokes *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957), in his second Question Presented. *Rogers* is a case about causation under the FELA, not negligence. It highlighted the statutory liability of employers for injuries "resulting in whole *or in part*" from their negligence, and disapproved of decisions imposing a more burdensome standard of causation on FELA plaintiffs. There is no dispute in the case at bar about causation, however. *Rogers* also reaffirmed the governing federal test for determining whether a jury question has been made out. In its opinion here the Virginia Supreme Court quoted extensively from *Rogers* on this point (App. 9-10) and applied precisely the appropriate standard: it reviewed the evidence and all reasonable inferences arising from the evidence in the light most favorable to petitioner to determine whether a jury issue existed on negligence. (App. 6, 9-14.)

The petition should be denied because the questions it poses for review are not raised by the opinion below, and because petitioner's argument fails to support the questions he asks this Court to review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF THE COURTS OF APPEALS.

Petitioner claims that the ruling below conflicts with decisions of this Court and of the Courts of Appeals. That assertion is incorrect. The result in each of the cases petitioner discusses reflects the allegations made and the evidence presented. Where a plaintiff has fairly alleged negligence, this Court has ruled that the complaint may not be dismissed on motion. Where evidence of a railroad's negligence has coexisted with evidence that the negligence played any part at all in the plaintiff's injury, this Court has ruled that the plaintiff's case should go to the jury. But where, as here, the plaintiff's proof has failed, the defendant has been entitled to judgment as a matter of law.

For instance, in *Urie v. Thompson*, 337 U.S. 163 (1949), the Missouri Supreme Court had improperly extended the function of a demurrer and had dismissed a plaintiff's FELA claim as a matter of law, ignoring his allegations that the railroad had knowingly used excessive quantities of a dangerous material and had negligently adjusted the dispensing equipment. In reversing, this Court emphasized that the issue of what constitutes negligence under the FELA is a federal question, and that well-pleaded allegations must be accepted as true for purposes of demurrers. 337 U.S. at 174-75. This Court also observed that one element of the plaintiff's claim of negligence under the FELA was whether "respondent 'knew or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect petitioner," and this Court disclaimed predicting whether, at trial, the plaintiff would be able "to shoulder the burden of proving respondent's knowledge." 337 U.S. at 178. *Urie* thus approves a notice principle that is analogous to the notice concept applied in petitioner's case, and requires proof of actual or constructive knowledge as a prerequisite to recovery, as was done in petitioner's case.

Urie belongs to a series of decisions through which this Court secured a uniform application of the FELA in the state and lower federal courts on two principal questions: the division of responsibility between court and jury in a federal civil case, and the appropriate burden that an FELA plaintiff faces in proving causation. Some courts were taking cases away from juries based on improperly onerous burdens of pleading or proof. Some courts had also failed to recognize that the FELA created a uniquely light causation requirement—a plaintiff had to prove only that the defendant's negligence played some part in causing his damages—and had instead insisted on proof of sole or principal proximate cause.

This line of cases reached its fullest expression in *Rogers v. Missouri Pacific Railroad*, in which the Mis-

souri Supreme Court had reversed a plaintiff's verdict, ruling that the employee's conduct was the sole cause of his mishap or was at least as probable a cause as any negligence of the employer. 352 U.S. at 504-05. Sufficient evidence clearly existed to permit the jury to find the railroad negligent; the dispute involved causation. Observing that many courts had misinterpreted the FELA's unusual causation scheme that imposed liability for injury "resulting in whole or in part from [the employer's] negligence," 45 U.S.C. § 51, this Court stated emphatically that an FELA case must go to the jury where the "proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

On the same day it decided *Rogers*, this Court in *Herdman v. Pennsylvania Railroad*, 352 U.S. 518 (1957), held that "a jury question of negligence was not presented by the proofs," where a railroad employee fell when his train braked suddenly to avoid hitting an automobile that unexpectedly crossed the train's path. 352 U.S. at 520. Thus, while this Court was emphasizing in *Rogers* the FELA's relaxed causation inquiry, it was simultaneously reconfirming in *Herdman* that an FELA plaintiff must prove the employer's negligence.

Schulz v. Pennsylvania Railroad, 350 U.S. 523 (1956), and *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), are cases in this line. In *Schulz* the trial court had directed a defendant's verdict on the ground that the plaintiff had failed to show causation. 350 U.S. at 523. This Court ruled that the plaintiff's case should have gone to the jury because the evidence showed employer negligence in requiring its employee to work in an obviously dangerous situation, and the circumstances of the employee's death strongly suggested that those dangerous conditions had contributed to his death. 350 U.S. at 526.

In *Wilkerson*, the state courts had ruled in favor of the defendant as a matter of law on the grounds that the "plaintiff's own negligence was the sole proximate cause" of the plaintiff's injuries and that the railroad was not negligent. 336 U.S. at 55. There was evidence that railroad employees had continued their longstanding and open practice of using a greasy, oily, and slippery walkway over an open maintenance pit, even after the railroad installed safety chains around it, thus suggesting that the railroad had actual or constructive knowledge of this continued use. 336 U.S. at 57-61. This Court therefore reversed and remanded the case for trial, emphasizing that the resolution of disputed issues of fact is for the jury, not the court, where the evidence permits varying conclusions.[5]

Petitioner also discusses two decisions from Courts of Appeals that are crucially unlike the case at bar in that, in each, evidence existed from which the jury could conclude that the defendant railroad knew or should have known of the offending defective condition before the plaintiff was injured. In *Beattie v. Elgin, Joliet & Eastern Railway*, 217 F.2d 863 (7th Cir. 1954), the court affirmed a plaintiff's judgment because the evidence justified a conclusion that the obviously unsafe condition that caused the plaintiff's injury "had existed frequently and recurringly for such a long time that defendant had constructive notice thereof." 217 F.2d at 866.[6] The court

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[5] Petitioner also briefly cites *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963). *Gallick* is another decision in the *Rogers* line of cases. 372 U.S. at 114-17. Additionally, *Gallick* states that "reasonable foreseeability of harm is an essential ingredient of [FELA] negligence." 372 U.S. at 117. Petitioner's burden under instruction No. 12 was in part a reflection of this proposition.

[6] Petitioner's quotation (Pet. at 18) of a sentence from *Beattie*, as quoted in *Chicago Great Western Railroad v. Smith*, 228 F.2d 180, 184 (8th Cir. 1955), is potentially misleading when read out of context. The *Beattie* decision rests on the case law establishing that if a dangerous condition has existed sufficiently long that the railroad, in the exercise of ordinary care, ought to have known of

in *Chicago Great Western Railway v. Smith*, 228 F.2d 180, 183-84 (8th Cir. 1955), affirmed a judgment for an employee injured while transporting cargo over a walkway, where evidence suggested that the walkway was unsafe when originally constructed by the railroad some months previously. Thus, the plaintiff in both of these cases had the crucial evidence of actual or constructive notice that petitioner lacked here.

The present case does not involve the causation inquiry that is the principal focus of the line of decisions on which petitioner relies. In its opinion here, moreover, the Virginia Supreme Court applied precisely the correct standard for allocating duties between court and jury. It viewed the record in the light most favorable to the petitioner and gave him the benefit of every reasonable inference arising from the evidence. The failure of *this* record to create a jury issue on negligence creates no conflict with decisions where the evidence did create a jury issue.

III. THE SUPREME COURT OF VIRGINIA DECIDED THIS CASE CORRECTLY.

A. No jury issue existed on constructive notice.

The principal question in this case has always been whether there was any evidence in the record from which the jury reasonably could have concluded that petitioner had met his burden under instruction No. 12 of proving

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its presence, then the railroad can be found negligent in failing to provide a safe place for working. The *Beattie* court reasoned that because the railroad regularly assigned employees to work in the location in question, the railroad was chargeable with knowledge of the *recurring* conditions *normally* existing there. 217 F.2d at 866. The isolated sentence quoted by petitioner, if not set within its context, might suggest the erroneous proposition that a railroad is automatically chargeable with knowledge of *any* condition that its employee encounters at a location at which he performs assigned duties. The essential fact that determined the outcome in *Beattie*, but that is absent in the case at bar, was the recurring, normal presence of an obviously unsafe condition at the assigned workplace.

that NW knew, or, in the exercise of ordinary care should have known, that the condition described by petitioner existed, and that NW had a reasonable opportunity to remedy this condition before petitioner encountered it. The Virginia Supreme Court correctly answered this question: "no."

By the express terms of the statute under which petitioner sued, proof of NW's negligence was an essential part of his claim. 45 U.S.C. § 51 (Pet. at 4); *Herdman v. Pennsylavnia Railroad*, 352 U.S. at 520 (holding that "a jury question of negligence was not presented by the proofs" and affirming a directed verdict entered for the railroad in a brakeman's FELA action).

This Court has described the evidential burden of an FELA plaintiff as follows:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. [Citation omitted.] Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." [Citations omitted.] If that requirement is met, . . . the issues may properly be presented to the jury.

Tennant v. Peoria & Pekin Union Railway, 321 U.S. 29, 32-33 (1944). In the same vein, this Court has said:

> Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

Schulz v. Pennsylvania Railroad, 350 U.S. at 526.

Here, where petitioner claimed that NW was negligent because of a defect in premises, he was required to show that NW knew, or in the exercise of ordinary care should have known, of the defect and had a reasonable opportunity to remedy the condition. *E.g., St. Louis Railway v. Ingram*, 124 Ark. 298, 187 S.W. 452, 453 (1916), *aff'd*, 244 U.S. 647 (1917). The trial court therefore gave the jury instruction No. 12, quoted above. Petitioner had no objection to this instruction, and it became the law of the case.

As the Virginia Supreme Court recognized, the record contains no evidence that NW actually knew of the protruding split crosstie that petitioner said he saw briefly after he fell. (App. 12.) Lacking evidence of such actual knowledge, petitioner's case necessarily rested entirely on the theory that NW should have known of the alleged condition in time to remedy it. But the record contains no evidence directly about, or creating an inference favorable to petitioner about, when the allegedly unsafe condition arose, how long it had existed, or what caused the condition to exist. No evidence suggests that the condition petitioner claimed to have seen after his fall existed before his fall, or existed a sufficient time before his fall that NW had an opportunity to discover and remedy it. Indeed, save for petitioner's own testimony, no evidence suggests that the condition ever existed, before or after petitioner's fall. The jury was thus left wholly to impermissible speculation regarding whether NW, in the exercise of ordinary care, should have known of the alleged condition and had a reasonable opportunity to remedy it.

No evidence suggests that NW's frequent inspections were other than perfectly adequate. The evidence of twice-weekly inspections, including an inspection on the Thursday before petitioner's Friday accident, and of the recent major maintenance performed on the track, all leads most naturally to an inference that no discoverable defect existed. The evidence that petitioner's supervisor

was unable to find any protruding tie end when, in broad daylight the next morning, he inspected the area to which petitioner had called his attention, coupled with the complete lack of any evidence corroborating the existence of a protruding tie, also strongly suggests that no discoverable defect existed.

No inference about when the alleged defect first became visible, what caused it, or whether NW in the exercise of ordinary care should have discovered it arises from the intrinsic nature of the situation petitioner said he saw. The only detailed evidence is petitioner's assertion that, after he fell, he saw the end of a split crosstie protruding two to four inches above the surrounding ballast. Petitioner admitted that this was not an unusual situation, and that he had seen such differentials "quite often." On his accident report, petitioner himself could not identify the condition he claimed to have seen as a "defective" condition. This evidence discloses nothing that should or would have called NW's attention to the area before the incident. In particular, this evidence gives rise to no inference regarding how the condition came to exist, how long it had existed, or whether NW, in the exercise of ordinary care, should have discovered and remedied it.

Given the total lack of evidence in this case regarding the origin, longevity, and discoverability of the condition petitioner said he saw, the jury had no basis except speculation on which to conclude that a dangerous condition existed that NW should have discovered and fixed before petitioner encountered it. The condition could have arisen shortly before petitioner encountered it as the result of the action of the elements, through the natural shifting of ballast, or through a lightning strike. The condition could have been caused by vandalism, or by the passage of a large animal or person, or by the operation of equipment on or near the tracks, such as a 4-wheel drive vehicle or an ATV. The protrusion could have first appeared when part of a tie was dislodged by the force of petitioner's own foot striking it. The end of the

tie could have come to protrude above the ballast only when petitioner stumbled and fell, causing ballast to shift. These are but illustrations of the uncircumscribed realm of speculation in which the evidence left the crucial issue of whether a defect existed that NW, in the exercise of ordinary care, should have discovered in time to have a reasonable opportunity to remedy. Petitioner did not have to disprove all of these potential theories, but as *Tennant* states, he did have the burden of introducing evidence that removed the issue from the realm of speculation and gave the jury an evidential basis for resolving it in his favor.

It is not difficult to hypothesize the types of evidence that could have given rise to the inference petitioner needed, if such evidence had been available. A sighting of the condition and a report of it as a defect before petitioner's accident would clearly have provided the missing link. Post-accident identification and examination of the condition might have suggested its long-term existence through, for instance, evidence of weathering on wood surfaces normally not exposed to the elements, or evidence of the long-term presence of dirt and gravel under an elevated portion of the crosstie, or evidence of markings on the wood or in the area suggesting a particular cause that was likely not of very recent origin. It was petitioner's total lack of any evidence of this sort—his lack of any evidence removing the questions of origin, duration, and discoverability from the realm of total speculation—that doomed his case.

In his argument petitioner relies primarily on the trial court's remark, made in denying NW's motion to strike, that the jury could "find from the evidence that something as heavy as a railroad tie wouldn't spring up instantaneously and be in such a condition weighed down by a railroad track." (Tr. II.60-61.) As the Virginia Supreme Court recognized, the trial court was mistaken. (App. 13-14.) The trial court's comment appeared to envision a condition in which part of a tie underlying the

rails was lifted up above its normal position despite the weight of the tracks. No evidence in the record supported any such conception. The trial court's comment also appeared to reflect the improper influence of the artist's drawing (the primary ground for NW's alternative request for a new trial), which depicted, without sufficient evidential support, an arguably discoverable condition involving a large and abnormally elevated portion of a crosstie. In any event, the trial court's comment mirrored the crucial deficiency in petitioner's case. In making this comment, the trial court was guessing, without evidential support, about the cause, duration, and discoverability of the alleged defective condition.

A straightforward application of the governing federal principles to the record in this case compels the conclusion that the Virginia Supreme Court reached: as a matter of law, no jury issue existed on the question of constructive notice.

B. The lack of floodlights at the Webb siding was not an alternative basis on which the jury could have found NW negligent.

In petitioner's brief filed in opposition to NW's petition for appeal to the Virginia Supreme Court, petitioner resurrected a theory he had initially pled but had then ignored in subsequent trial court proceedings: he suggested that the jury might have found NW negligent on the alternative theory that it breached its duty to use reasonable care to provide a reasonably safe place to work because the eastbound main line was not floodlit at night and petitioner stumbled while working by lantern light. The Virginia Supreme Court accurately noted that petitioner "abandoned this theory at trial because he did not present any evidence of inadequate illumination." That court also rejected this alternative theory on its merits. (App. 14-16.)

Any theory of inadequate lighting as negligence was insupportable in this case both factually and legally,

which is undoubtedly why petitioner did not pursue it at the trial level. The evidence established that petitioner was working at night at an unlighted siding in a remote location in West Virginia between NW's eastbound and westbound main lines. The evidence disclosed no buildings or ongoing activities at the site. This was merely a location at which NW could park a string of cars for later pickup—precisely the job in which petitioner's crew was engaged. The evidence showed that working at night is part of a brakeman's normal duties (Tr. I.110-11; II.83), and that when they work at night, NW brakemen carry a lantern having two bulbs, one providing a focused beam for shining on the work at hand and the other casting a broad light below for walking. (Tr. I.65; II.84.) Petitioner himself confirmed that his lantern was turned on while he was working, that he had not tripped before the incident of which he complained, and that by using his lantern he had experienced no difficulty seeing where he was going well enough to avoid tripping until the time of his accident. (Tr. I.111-12.) After he fell, he looked around by lantern light and had no trouble seeing the "split crosstie" that he thought had caused him to fall. (Tr. I.114.)

Petitioner did not introduce any evidence at trial regarding a standard of care with regard to lighting the eastbound main line where he fell. He introduced no evidence, either lay or expert, suggesting implicitly or explicitly that NW should have provided lighting in addition to the two-beam lantern that petitioner carried with him. He did not claim that he fell because of inadequate lighting. As a purely factual matter, therefore, the evidence could not support any claim that NW breached a duty of reasonable care to provide reasonable lighting under the circumstances.

NW has found only one FELA decision even addressing a claim that a railroad was negligent by failing to provide broad artificial lighting for railroad employees performing ordinary nighttime activities for which a hand-

held light source was ordinarily sufficient. In *Dolmage v. Chicago, R.I. & P.R. Co.*, 63 N.W.2d 273 (Minn.), *cert. denied*, 348 U.S. 822 (1954), the Minnesota Supreme Court ruled as a matter of law that a railroad could not be held liable under the FELA for failing to provide permanent lighting in a switchyard where an employee who had forgotten his flashlight fell while crossing the yard:

> *Surely a railroad need not provide a scheme of fixed lighting for routes which are used by its employees infrequently and which can be adequately lighted by flashlight when the occasion arises.* . . . to sustain a jury's finding that a railroad was negligent in failing to provide adequate lighting under circumstances such as presented here, where a flashlight would be otherwise adequate, would make our previous conclusions meaningless and, for all practical purposes, would make a railroad an insurer of its employee's safety while in its yard at night. *It would impose upon railroads the intolerable burden of lighting every foot of trackage where an employee might possibly cross during the hours of darkness in anticipation of the possibility that the employee's flashlight might fail mechanically or be mislaid.* We find nothing in the Federal Employers' Liability Act to indicate such a legislative intent. Accordingly, we hold that the evidence fails to establish that defendant was under any duty to light the trackage area in question and that it is insufficient to support the jury's finding that defendant was negligent in failing to provide adequate lighting under the circumstances of this case.
>
> Mindful that this is a federal question we have examined the federal decisions, but we have found none that would indicate a result contrary to that we have reached.

63 N.W.2d at 277 (emphases added).

The present case is even clearer than *Dolmage*. Petitioner's accident took place in a remote location on the main line, not in a switchyard. Petitioner was using his

railroad-issued two-beam lantern, whereas the plaintiff in *Dolmage* had forgotten his own flashlight. The evidence in the present case is unrebutted that the light from petitioner's lantern was sufficient for him to walk without difficulty and perform his duties. No evidence suggests that general floodlighting of the eastbound main line, where petitioner ultimately testified he fell, was appropriate or necessary. Under these circumstances, *Dolmage*'s ruling that a railroad has no duty to light every foot of trackage where an employee might possibly walk during the hours of darkness applies with redoubled force.

Finally, petitioner abandoned any theory of inadequate lighting as negligence in the trial court, and the Virginia Supreme Court properly refused to allow him to revive it on appeal. The Virginia Supreme Court "review[s] cases on the theories upon which they were tried in the court below." *Myseros v. Sissler,* 239 Va. 8, 10 n.2, 387 S.E.2d 463, 464 n.2 (1990). Petitioner was not in the position of a litigant who could assert that the trial court had reached the right result for the wrong reason, or who could rely on alternative supporting grounds that were fully developed and presented to the trial court. This was, rather, a situation in which an abandoned theory was tardily resurrected out of concern for the viability of the theory on which the case was tried.

In his motion for judgment, petitioner listed failure to provide proper lighting as one basis for his claim. (R. 2.) He did not pursue this theory, however. Instead, he developed and presented his case solely on the theory that NW was negligent in failing to discover and fix a split crosstie on the eastbound main line. Petitioner did not mention any theory of inadequate lighting as negligence in his opening statement to the jury. He introduced no evidence suggesting that a railroad has a duty to floodlight its main line tracks, or that the light from his dual-bulb lantern was insufficient to permit him to perform his duties safely. He did not argue any theory of inadequate lighting to the

jury in closing argument.[7] He did not ask for or receive any instructions on such a theory. He did not raise this theory in the briefing on NW's motion to set aside the verdict. He first reasserted this alternative theory as a fallback position in his brief in opposition to NW's appeal.

It is quite true that darkness was a circumstance of this case. Petitioner mentioned it in his opening statement, his evidence, and his closing argument. But petitioner fails to recognize the distinction between mentioning the undisputed *fact* of darkness and asserting a legal theory of negligent failure to provide adequate lighting under the circumstances. Such a theory requires proof of the existence of a duty, breach of that duty, causation, and damages. Petitioner failed to present at trial any evidence or any argument on these essential elements of a legal theory of inadequate lighting. Because petitioner clearly contemplated this theory when he first filed his case but failed to pursue it, he waived the theory he now attempts to reassert. *Bergmueller v. Minnick*, 238 Va. 332, 338, 383 S.E.2d 722, 725 (1989) ("Waiver is the voluntary, intentional abandonment of a known legal right.").

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[7] Because the claim of inadequate lighting had disappeared from the case after the filing of the motion for judgment, and it had not figured in any way in the trial or post-trial proceedings, NW's counsel did not originally request transcription of petitioner's opening statement and closing argument. Thus, those segments of the trial were not part of the transcript that was filed with the Supreme Court of Virginia and made part of the record on appeal. The inadequate lighting theory first resurfaced in petitioner's brief in opposition to NW's state petition for appeal, which was filed long after expiration of the 60-day period allowed by the Virginia Rules for filing trial transcript. *See* Rules 5:10(a)(7) and 5:11(a) of the Rules of the Supreme Court of Virginia. At that point NW's counsel did obtain transcriptions of plaintiff's opening statement and closing argument and verified that no theory of inadequate lighting was mentioned or argued. NW's counsel is confident that petitioner's counsel will concede that the inadequate lighting theory was not mentioned in petitioner's opening statement or closing argument.

CONCLUSION

This is simply a case where the proof failed to raise a jury issue on negligence. It involves no misapplication of state common law standards to an FELA action, contrary to the assertions in petitioner's Questions Presented. It presents no conflict with applicable federal decisions. Instead, it represents an appropriate and unexceptional application of the proper federal legal standards to the evidence. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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